Supreme Court U.S.
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No. 06-598

IN THE

Supreme Court of the United States

DOUG HAGOOD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The instant Petition focuses on Mr. Hagood's claim that the Metropolitan Government discriminated against him on the basis of a "disability" in violation of Title I of the Americans with Disabilities Act. The district court dismissed this claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the Sixth Circuit upheld the district court's dismissal. The district court, and the Sixth Circuit, held that Mr. Hagood's Title I claim fails because: (1) he does not fit the definition of "qualified individual with a disability;" and (2) even if he did meet this definition, the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner."

Mr. Hagood's Petition focuses exclusively on whether the lower courts erred in concluding that he does not meet the definition of "qualified individual with a disability." He does not address the issue of whether the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner."

With this background, the questions presented by this Petition are:

1. Whether Mr. Hagood has presented compelling reasons to grant this Petition, notwithstanding the independent, alternative basis for the Sixth Circuit's decision, which Petitioner has not challenged?

2. Whether review of Mr. Hagood's Petition would represent an "expression of abstract opinion"?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Parties to the Proceeding

There are no parties to the proceedings other than those listed in the caption.

Rule 29.6 Statement

Respondent, The Metropolitan Government of Nashville and Davidson County, Tennessee, has no parent corporation, and no publicly held company owns 10% or more of its stock.

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SUMMARY OF REASONS FOR DENYING THE PETITION

Mr. Hagood's Petition focuses exclusively on whether the lower courts erred in concluding that he does not meet the definition of "qualified individual with a disability." He does not raise the issue of whether the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner," an independent, alternative ground for the underlying decision. Because Mr. Hagood does not challenge this alternative ground, he is asking this Court to issue an "expression of abstract opinion," which the Court is loathe to do. Furthermore, the alternative ground for the Sixth Circuit's opinion does not raise a split among the circuits, nor does it implicate this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

For these reasons, Mr. Hagood's Petition does not merit review in this Court. Accordingly, the Metropolitan Government requests that the Court deny Mr. Hagood's Petition.

STATEMENT OF THE CASE[1]

I. Statement of Facts[2]

A. Mr. Hagood's Employment With the Metropolitan Government and Receipt of Disability Pension Benefits

Mr. Hagood is a former Metropolitan Police Officer. (Jt. Apx. 11) On December 19, 1973, Mr. Hagood was injured in the line of duty when he was involved in an automobile accident. (Jt. Apx. 11) As a result of his injuries, Mr. Hagood is not able to work "in any significant capacity." (Jt. Apx. 12) From 1975 to the present, Mr. Hagood has received a disability pension from the Metropolitan Government. (Jt. Apx. 12-13)

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1. Petitioner Doug Hagood will be referred to as "Petitioner" or "Mr. Hagood." The Metropolitan Government of Nashville and Davidson County, Tennessee will be referred to as the "Metropolitan Government." The Sixth Circuit Court of Appeals will be referred to as the "Sixth Circuit" or "Court of Appeals." Mr. Hagood's Petition for Writ of Certiorari will be referred to as the "Petition." Citations to the Record will be made in one of two ways. Those items that are included as appendices to the Petition will be referred to as "(Petition, Appendix __)". Citations to items not included in the Petition will be made to the Joint Appendix on file with the Clerk of the Sixth Circuit, and designated as "(Jt. Apx. __)".

2. The "facts" set forth herein are drawn from Mr. Hagood's Complaint and the Metropolitan Code of Laws. "A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice." *New England Health Care Employees Pension Fund v. Ernst & Young*, 336 F.3d 495, 501 (6th Cir. 2003). The Metropolitan Code of Laws is a matter of public record that the district court appropriately considered in ruling on the Metropolitan Government's motion to dismiss.

B. Calculation of Disability Pension Benefits Under the Metropolitan Code

The Metropolitan Government's Code of Laws governs the calculation of a disability pensioner's annual benefit. Under the Metropolitan Code, the annual benefit payable to any disability pensioner is his or her "net disability pension," which equals the pensioner's "gross disability pension" minus: (1) any social security benefit the pensioner receives; and (2) the appropriate "disability pension deduction." (Jt. Apx. 71)

A pensioner's "gross disability pension" ranges from 60 to 70 percent of his or her earnings over the twelve months preceding retirement, depending upon whether the pensioner has dependent children. (Jt. Apx. 71) This number is then reduced by: (1) any social security benefit the pensioner receives; and (2) the appropriate "disability pension deduction." (Jt. Apx. 71)

A reduction based upon the pensioner's receipt of social security benefits is self-explanatory. The "disability pension deduction" is a provision whereby disability pensioners may earn a limited amount of outside income without having their pension benefits reduced. If a pensioner goes over this limitation, however, his or her pension benefits are reduced on a dollar-for-dollar basis for any amount over the limit. (Jt. Apx. 71, 76-77)

II. Proceedings Below

On January 21, 2005, Petitioner Doug Hagood filed suit against Respondent, the Metropolitan Government of Nashville and Davidson County, Tennessee. (Jt. Apx. 4) Mr. Hagood asserted five causes of action against the

Metropolitan Government: (1) employment discrimination under Title I of the ADA; (2) discriminatory denial of public services in violation of Title II of the ADA; (3) employment discrimination and discriminatory denial of public services in violation of Section 504 of the Rehabilitation Act; (4) employment discrimination under the Tennessee Handicapped Discrimination Act; and (5) violation of the Equal Protection Clause of the United States Constitution. (Jt. Apx. 14-21) All of Mr. Hagood's claims hinged upon his contention that the Metropolitan Government's disability pension plan is discriminatory insofar as it uses the same formula to calculate disability benefits regardless of the pensioners' specific physical or mental impairment. (Jt. Apx. 14-21)

On March 24, 2005, the Metropolitan Government moved to dismiss Mr. Hagood's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Jt. Apx. 32) The district court granted the Metropolitan Government's motion on April 28, 2005, dismissing Mr. Hagood's Complaint in its entirety. (Petition, Appendix C)

On May 16, 2005, Mr. Hagood filed a notice of appeal. (Jt. Apx. 31) On May 9, 2006, the Sixth Circuit issued its decision upholding the district court's grant of the Metropolitan Government's motion to dismiss in its entirety. (Petition, Appendix B)

On May 18, 2006, Mr. Hagood filed a petition for rehearing and suggestion for rehearing *en banc*. On July 28, 2006, the Sixth Circuit denied Mr. Hagood's petition for rehearing and suggestion for rehearing *en banc*. (Petition, Appendix A)

Mr. Hagood filed his Petition for Writ of Certiorari in the United States Supreme Court on October 26, 2006.

REASONS FOR DENYING THE PETITION

I. Because Mr. Hagood Does Not Raise all of the Grounds for the Underlying Decision, He is Asking This Court to Issue An Advisory Opinion

Mr. Hagood raises one issue on appeal – whether Title I of the Americans with Disabilities Act ("ADA") is ambiguous with respect to who has standing to file suit, notwithstanding the statutory definition of "qualified individual with a disability." (Petition, p. i). Title I of the ADA prohibits discrimination against a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Under Title I of the ADA, "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 12111(8).

Mr. Hagood asserts that the district court and the Sixth Circuit erred in concluding that he does not fall within the definition of "qualified individual with a disability;" however, Mr. Hagood does not challenge the independent, alternative grounds for the underlying decision. The district court actually dismissed Mr. Hagood's ADA claims on three separate grounds. First, the court held that Mr. Hagood is not a "qualified individual with a disability." (Petition, Appendix D) Second, the district court held that Mr. Hagood's "access to services" claim fails because

employment discrimination claims are the exclusive province of Title I of the ADA. (Petition, Appendix D) Finally, the district court held that even if Mr. Hagood had standing to sue under the ADA, his claims would fail because the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner." (Petition, Appendix D). As the district court noted, Mr. Hagood does not allege that the benefits he receives are unequal. (Petition, Appendix D) To the contrary, Mr. Hagood argues that the benefits he receives *should be unequal*, based upon his particular disability. But as the district court held, the ADA does not require that the Metropolitan Government provide differential treatment. (Petition, Appendix D)

On appeal, the Sixth Circuit affirmed the district court's decision on all three grounds, in effect, adopting the district court's reasoning. (Petition, Appendix B) The Sixth Circuit also noted that Mr. Hagood "does not claim that he is being denied access to disability benefits or is being discriminated against under the terms of the disability benefit program solely because of his disability, but rather, claims that the benefits under the plan *should* discriminate on the basis of the degree of disability." (Petition, Appendix B)

In his Petition, Mr. Hagood asserts that the district court granted the Metropolitan Government's motion to dismiss on one "ground" – he does not fit the statutory definition of "qualified individual with a disability." (Petition, p. 3) Mr. Hagood fails to mention the additional basis for the district court and the Sixth Circuit's decisions. Because Mr. Hagood has not challenged the alternative basis for the underlying decision, even if this Court were to grant certiorari, the

outcome of this case would be no different. Mr. Hagood is, in effect, asking this Court to issue an advisory opinion, which the Court is loathe to do. *See Mills v. Rogers*, 457 U.S. 291, 305 (1982) ("review of one basis for a decision supported by another basis not subject to examination would represent an 'expression of abstract opinion.'") (citations omitted); *Ford v. Schering-Plough Corp.*, 145 F.3d-601, 615 (2nd Cir. 1998) (Alito, J., concurring) ("In light of the ease with which Ford's claims can be resolved under section 501(c), I would not reach the more difficult issues of: 1) whether a former employee who can no longer work can meet Title I's "qualified individual with a disability" requirement. . . .")

For this reason, the Court should deny Mr. Hagood's Petition.

II. Petitioner Has Not Demonstrated Any Disagreement Between the Circuit Courts on the Merits of His Case

The crux of Mr. Hagood's argument is that there is a split among the circuit courts as to whether a former employee who is unable to perform the essential functions of his or her job may bring suit under Title I of the ADA. While focusing on this issue ignores the lower courts' holding that his case fails on the merits, even if Mr. Hagood had raised the alternative grounds, his Petition should be denied because there is no split in authority on this issue.

To the contrary, two of the cases Mr. Hagood cites - *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (2nd Cir. 1998), and *Castellano v. City of New York*, 142 F.3d 58 (2nd Cir. 1998) – actually support the Sixth Circuit's analysis. In *Ford*, the

Third Circuit Court of Appeals addressed: (1) whether a former employee who is no longer able to perform the essential functions of her job, with or without an accommodation, can maintain a claim under Title I of the ADA; and (2) whether an employer violates Title I of the ADA by offering an insurance plan that is accessible to all employees, regardless of disability, but that provides different levels of coverage for different types of disabilities. 145 F.3d at 608-10. While the Third Circuit held that a former employee can maintain a claim under Title I, it upheld the district court's grant of Schering-Plough's motion to dismiss, because "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for every type of disability." *Id.* at 608.

The Second Circuit took the same approach in *Castellano*. In *Castellano*, the Second Circuit held that while a former employee presently receiving disability pension benefits could bring suit under Title I of the ADA, "[t]he ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have given an equivalent amount of service." 142 F.3d at 70-71.

The only opinion Petitioner cites that would constitute a contrary ruling – *Johnson v. K-Mart Corporation*, 273 F.3d 1035 (11th Cir. 2001) – has been *vacated* pending review by the Eleventh Circuit *en banc*. *Id.* at 1070. Since that time, all action in the case has been stayed pending resolution of K-Mart's bankruptcy petition. *Johnson v. K-Mart*, 281 F.3d

1368 (11th Cir. 2002).[3] Accordingly, as multiple courts have held, *Johnson* has no binding effect. *See EEOC v. Group Health Plan*, 212 F. Supp.2d 1094, 1098 n.5 (E.D. Mo. 2002); *Breen v. Carlsbad Municipal Schools*, 67 P.3d 908, 916 (Ct. App. N.M. 2003); *reversed on state law grounds*, 120 P.3d 413 (N.M. 2005).

Finally, the conclusion that Mr. Hagood's claim fails on the merits is consistent with the Equal Employment Opportunity Commission's Compliance Manual. According to the EEOC's Compliance Manual,

> If a charge alleges that the terms of an employee benefit plan discriminates on the basis of a

3. Mr. Hagood cites *Johnson v. K-Mart Corporation* for the proposition that the Eleventh Circuit holds that a former employee who is unable to perform the essential functions of his or her job may bring suit under Title I of the ADA. (Petition, pp. 5-6). As discussed above, *Johnson* has been *vacated*. Furthermore, the Eleventh Circuit revisited this issue in *Slomcenski v. Citibank*, N.A., 432 F.3d 1271 (11th Cir. 2005). In *Slomcenski*, the Eleventh Circuit held that a former employee who was drawing disability benefits *cannot* bring suit under Title I of the ADA, stating:

> > Slomcenski could not have been considered a qualified individual with a disability when Citibank attempted to enforce the mental or nervous disorder limitation provision against her in January 2002 because her claim for [long term disability] benefits was premised on her representation that she was unable to perform every occupation for which she was qualified or could become qualified. *** Because Slomcenski could not demonstrate that she was a qualified individual with a disability as required to bring a claim under the ADA, the district court properly granted summary judgment in favor of Citibank on [her] ADA claim.
>
> *Id.* at 1281.

> disability, the first question is whether the employer has provided benefits to a qualified employee with a disability that are *equal* to the benefits provided to employees generally under the plan. *** *If the employer has provided equal benefits, there is no ADA violation.*

EEOC Compliance Manual § 3-IV (emphasis added); *see also Williams v. London Utility Commission*, 375 F.3d 424, 428 (6th Cir. 2004) (holding that the plaintiff must show discrimination on the basis of his or her disability to present a prima facie case). *Id.* at 344-45.

Because Mr. Hagood's claim fails on the merits, his Petition should be denied.

III. The Dismissal of Petitioner's Case on the Merits Does Not Implicate The Supreme Court's Decision in *Robinson* and is in Accordance with Supreme Court Precedent

In his Petition, Mr. Hagood argues that the Sixth Circuit's holding in the instant case is inconsistent with *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997). As an initial matter, the statutory definition of "employee" is far different than the statutory definition of "qualified individual with a disability." Furthermore, in *Robinson*, the Court did not address the merits of the plaintiff's Title VII claim. In *Robinson*, the Court addressed whether former employees fall within the statutory definition of "employee" for purposes of Title VII of the Civil Rights Act of 1964. *Id.* at 344-45.

In the instant case, the lower courts addressed Mr. Hagood's standing and the merits of his ADA claim. This

Court's decision in *Robinson* has no bearing on whether the district court and the Sixth Circuit correctly decided that Mr. Hagood's claim fails on the merits. In fact, the dismissal of Petitioner's claim on the merits is consistent with this Court's decisions in *Alexander v. Choate*, 469 U.S. 287, 305 (1985) (holding that the Rehabilitation Act "does not . . . guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed"), and *Traynor v. Turnage*, 485 U.S. 535, 549 (1988) (holding that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons").[4]

CONCLUSION

Mr. Hagood's Petition focuses exclusively on whether the lower courts erred in concluding that he does not meet the definition of "qualified individual with a disability." He does not raise the issue of whether the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner," an independent, alternative ground for the underlying decision. Because Mr. Hagood does not challenge this alternative ground, he is asking this Court to issue an "expression of abstract opinion," which the Court is loathe to do. Furthermore, the alternative ground for the Sixth Circuit's decision does not raise a split among the circuits, and does not implicate this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

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4. Cases interpreting the Rehabilitation Act are instructive in analyzing cases brought under the ADA. *See McPherson v. Michigan High Sch. Ath. Ass'n*, 119 F.3d 453, 459-60 (6th Cir. 1997) (*en banc*) ("The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and 'cases interpreting either are applicable and interchangeable.'") (citations omitted).

For these reasons, Mr. Hagood's Petition does not merit review in this Court. Accordingly, the Metropolitan Government requests that Mr. Hagood's Petition be denied.

Respectfully submitted,

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